IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-461

JOHN CONNALLY,

Appellant,

-vs-

THE STATE OF GEORGIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Georgia, in the case of the *State versus John Connally* being No. 30,815, Georgia Supreme Court, and in particular Volume 237, page 203-213 of the Georgia Reports, being the official opinions of the Supreme Court of Georgia. The opinion is attached hereto and made a part hereof as Appendix "A." The dissenting opinion in the reported decision is attached hereto and made a part hereof as Appendix "B." The decision by the Georgia Supreme Court affirmed by a 5 to 2 decision, a judgment of conviction in the Superior Court of Walker County, Georgia. (R-24) (R-42)

JURISDICTION

The grounds upon which the jurisdiction of the Supreme Court of the United States is invoked are as follows:

(i) The nature of the proceeding in the Supreme Court of Georgia, which is a Court of last resort in the State of Georgia, was an appeal from a conviction of the appellant in the Superior Court of Walker County, Georgia, on the 19th day of June, 1975, for a violation of the Georgia Controlled Substances Act (Title 79A, section 8, Georgia Code Annotated (Possession of Marijuana)). THE DEFENDANT WAS SENTENCED TO EIGHT YEARS IN THE STATE PENITENTIARY OR SUCH OTHER PLACE AS THE BOARD OF CORRECTIONS MIGHT DETERMINE. (R-42)

This Court's jurisdiction is predicated on 28 U.S.C.A. § 1257, and specifically Section 2 thereof, which states:

> 1257. STATE COURTS; APPEAL; CERTIORARI
> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

(ii) The judgment of the Supreme Court of Georgia (R-34) from which a review is sought was entered on the 9th day of July, 1976, and the notice of appeal was filed on the 8th day of August, 1976, in the Supreme Court of Georgia.

(iii) The statutory provision which confers jurisdiction on the Supreme Court of the United States of this appeal is 28 U.S.C.A. § 1257(2).

(iv) The following cases sustain jurisdiction of this court in this matter:

> *Michigan Cent. R. Co. vs. Michigan Southern R. Co.*, 60 U.S. 378 (1857); *Green v. Frazier*, 253 U.S. 233 (1920); *Scudder v. New York*, 175 U.S. 32 (1899); *Columbia Water Power Co. v. Columbia Electric St. R., Etc., Co.*, 172 U.S. 475 (1899); *Miller v. Cornwall R. Co.*, 168 U.S. 131 (1897); *Levy v. San Francisco Court*, 167 U.S. 175 (1897); *Murdock v. Memphis*, 87 U.S. 590 (1875); *Adams v. Preston*, 63 U.S. 473 (1860); also, *Local 333B, United Marine Division of Intern. Longshoremen's Ass'n (A.F.L.) v. Battle*, 101 F. Supp. 650, affirmed, 342 U.S. 880 (1951); *Horwitt v. Horwitt*, 90 F. Supp. 528 (1950).

(v) The constitutional validity of the following state statute is drawn in question: Georgia Code Annotated § 24-1601 (Acts 1877, pp. 83-84; 1878-9, p. 191; 1882-3, p. 110; 1887, p. 55; 1909, p. 175; 1918, p. 124; 1919, p. 99; 1949, pp. 956-959; 1958, pp. 201, 202; 1967, p. 469). A copy of said statute is appended hereto as Appendix "C."

There was no rehearing in the Georgia Supreme Court, therefore, no order on same.

A copy of the notice of appeal is appended hereto as Appendix "D," showing the date it was filed and the name of the Court in which it was filed.

QUESTIONS PRESENTED

(I) Whether or not § 24-1601 Georgia Code Annotated (Acts 1877, pp. 83, 84; 1878-9, p. 191; 1882-3, p. 110; 1887, p. 55; 1909, p. 175; 1918, p. 124; 1919, p. 99; 1949, pp. 956-959; 1958, pp. 201, 202; 1967, p. 469) which sets the fee for a justice of the peace for issuing a search warrant and which sets his compensation if he issues a warrant at $5.00 but fails to provide any compensation if he fails to issue a warrant is offensive to the *Fourth and Fourteenth Amendments* to the United States Constitution in that it deprives the defendant of the right to remain free from unreasonable searches and seizures for the reason that the magistrate issuing the search warrant is not neutral and detached as is required by said Constitutional provisions and decisions thereunder but instead is financially interested in his decision.

(II) Whether or not a police officer may eavesdrop on a telephone conversation to which the defendant was a party, then subsequent thereto come into court at the defendant's trial and testify as to the contents of the conversation to which the officer was not a party, claiming that he had the consent of one of the parties to the conversation but refusing to state who gave him the consent, how the consent was given, where the consent was given and thereby effectively deciding and removing from the judiciary the determination of whether or not the defendant's Fourth Amendment rights were violated, to-wit: Freedom from unreasonable searches and seizures and the corresponding right of privacy all under the auspices of a state statute, which allows such an eavesdropping as construed by the Supreme Court of the State of Georgia.

STATEMENT OF THE CASE

The questions hereinabove referred to with respect to the issuance of the search warrant were first raised on a Motion to Suppress (R-43-56) and ruled on in a written order by the trial judge overruling said motion (R-57), prior to the trial of the within and foregoing case before a jury in the Superior Court of Walker County, Georgia. The question was preserved on appeal in an Enumeration of Error to the Georgia Supreme Court in written form (R-25) and ruled upon adversely to the defendant in the opinion of the Georgia Supreme Court (R-7-13).

The question respecting the admissibility of the conversation on which the officer eavesdropped was first raised by oral objection, on the trial of said case when said testimony was sought to be introduced, by counsel for the defendant, now appellant, prior to the officer giving the challenged testimony before the jury (R-283-294). The Court orally overruled the defendant's objections at R-287, line 20 and R-290, line 15 and R-293, line 19.

The defendant, now appellant, preserved the questions on appeal in an enumeration of error (R-25) and following same in its notice of appeal to the United States Supreme Court (R-2-3).

During the course of the appellant's trial for possession of marijuana, the State sought, through the testimony of Agent Joe Frank McCullough, to introduce an admission by the appellant (R-270). The admission consisted of an oral statement to an unnamed informer wherein the appellant indicated that he would have "three or four hundred pounds within the next few

days." (R-291) The admission came as a result of a telephone call placed by the informer to the appellant. (R-291, line 15) DURING THE CONVERSATION, AGENT McCULLOUGH WAS ALLEGEDLY LISTENING IN ON AN EXTENSION PHONE. (R-294)

Counsel for Appellant objected to the use of the admission in evidence in that it had been obtained in violation of Georgia Code Annotated § 26-3001, and further that to admit said testimony would constitute a violation of the *Fourth and Fourteenth Amendments* to the *United States Constitution* in that it deprived the appellant of his right to privacy as contained in the broader right of remaining free and secure from unreasonable searches and seizures. The State countered by contending that the eavesdropping had been consented to by the informer, pursuant to Georgia Code Annotated, Section 26-3006, and hence was within a specified statutory exception to the Invasion of Privacy Act. On the question of consent, no one testified other than McCullough, who claimed that consent had been given. (R-283, line 2-11) Counsel thereupon objected that testimony by McCullough as to what the informer had told him would be inadmissible hearsay and would deprive appellant of the right of confrontation as the informer who allegedly consented was not present in the Courtroom. (R-288) Additionally, Agent McCullough refused to divulge the informer's name (R-283, line 12). The trial court supported Agent McCullough in this refusal, ruling the "consent," such as it was related, sufficient, and allowed Agent McCullough to relate the entirety of the conversation between the appellant and his alleged informer, as it had been overheard by him. (R-287-288)

At the hearing on the defendants' Motion to Suppress, Officer K. M. Visage testified that he first appeared before The Justice of the Peace, the Honorable Winston Murphy, on April 18, 1975, (R-396) and that subsequently two search warrants were issued including a second warrant which was issued on the 7th day of May, 1975. (R-399) (R-555-567)

Officer Visage, the officer who appeared before the magistrate issuing the search warrant, testified that the District Attorney's secretary actually typed up the affidavit and the search warrant (R-426-427).

Officer Visage further testified that an exact duplicate of the April 18th warrant signed by Winston Murphy was also issued on May the 7th, the only exception being Mr. Murphy adding a new signature and a new date. (R-428)

The Honorable Winston Murphy, the magistrate who issued the search warrant which is under attack in these proceedings, did not type the search warrants and affidavits and did not have it typed up, as it was prepared for him by the District Attorney and the Sheriff's Deputies and all the magistrate did was sign his name and date same. (R-429)

The Honorable Winston Murphy, Justice of the Peace, is compensated by the payment of a fee for the issuance of warrants.

Officer Visage further testified that he obtained the warrant upon which the search was conducted at about 5:00 p.m., the afternoon of May the 7th, 1975. Officer Visage went to Winston Murphy and had him sign the warrant upon which the search was conducted, pursuant to a phone call he received from an officer, Joe McCul-

lough in Chattanooga, Tennessee, stating the "stuff was there." (R-430) Officer McCullough did not relate to Officer Visage how he knew the "stuff" was there such that Officer Visage did not relate how he knew the "stuff" was there to the Magistrate who signed his name to the search warrant. (R-430) Officer Visage testified that he did not execute or conduct a search pursuant to the warrant issued on April the 18th, 1975, because "Joe McCullough told me he would let me know when the marijuana was there." (R-446)

An additional search warrant and affidavit were typed up on May the 2nd, 1975, pursuant to additional information obtained on April 29th, 1975 (R-453), but still the warrant was not signed by the Justice of the Peace, Winston Murphy, as it had been typed up for him by the District Attorney and the Police Officers, until May the 7th, 1975, pursuant to a telephone conversation from McCullough in Chattanooga, Tennessee, to Visage in LaFayette, Georgia, wherein McCullough related "the stuff is there."

Officer Visage testified that the reason no action was taken pursuant to the first warrant and no action was taken pursuant to the additional information on the 29th of April was because he was waiting on McCullough to tell him that the marijuana was there before having the May 7th warrant signed by the Justice of the Peace.

Officer Visage testified as to the April 18th warrant as follows: (R-449)

"Q. I see. Did the Justice of the Peace inquire as to what happened to the warrant he issued?"

"A. Yes, Sir."

"Q. He did inquire?"

"A. Yes, Sir."

"Q. When did he inquire?"

"A. On the second occasion, on the 7th of May."

"Q. On the 7th of May, that's the first time he inquired about what happened to the search warrant he issued on the 18th?"

"A. I think he asked me one time did we have any luck or anything like that."

"Q. Did you have any luck, he was concerned about it, wasn't he?"

"A. He was concerned because he had signed the warrant."

"Q. Well, in effect, he was working with you, wasn't he?"

"A. No, sir—with me?"

"Q. Well, assisting you, working with you as to whether or not you had any luck?"

"A. No, sir, the only thing he works with us is if we have a warrant or search warrant, he signs the search warrant."

"Q. He signs the search warrant?"

"A. Yes, sir."

The Justice of the Peace is compensated at the rate of $5.00 for issuing a search warrant but is not compensated at all if he does not issue a search warrant. (R-499) The Justice of the Peace who issued the warrant in question, in a series of questions and answers with attorney for appellant at the pre-trial hearing on the ap-

pellant's motion to suppress, engaged in the following dialogue with appellant's attorney: (R-500)

"Q. Now with respect to issuing the search warrant, Mr. Murphy, does the $5.00, since that's the only way you get paid, does that enter your mind when you're sitting there contemplating whether or not to issue a search warrant?"

"A. It has."

"Q. As a matter of fact, I believe you quite honestly and candidly told me on the day we had that preliminary hearing up here, I believe that was on, the best I can recall, it was on the 18th of May, that you would be a liar if you said it didn't enter your mind?"

"A. That's what I said."

"Q. Is that true now, you would be a liar if you said it didn't enter your mind?"

"A. It's only human nature to me."

Mr. Murphy further testified that he is a justice of the peace for a livelihood, that he gets no salary at all and that his livelihood depended upon how many warrants he issues. (R-500-502). He further testified in the pre-trial hearing that since January 1st, 1973, he had issued some 10,000 warrants for either arrests or searches (R-501-502). The Honorable Winston Murphy stated that he had no legal background for the issuance of warrants (R-507), and has at most attended one or two seminars (R-507, 514).

At the trial of the case there was introduced into evidence the various articles listed on the return to the affidavit to the search warrant and said evidence precipitated the defendant's conviction.(R-567). Furthermore, upon questioning by the District Attorney on the trial of the case against the defendant, JOHN CONNALLY, Officer Visage, affiant on the affidavit pursuant to which the search warrant was issued, stated: (R-114)

"Q. Now did you come back to Lafayette and execute that search warrant?"

"A. I had it signed by the J. P., yes, sir."

"Q. Now did you ever execute that particular search warrant?"

"A. No, sir, I did not."

"Q. Now why did you not ever execute that search warrant?"

"A. I had information that drugs was not in the house at that time." (sic)

Additionally when the search warrants were issued on May the 7th, 1975, which were typed up May the 2nd, 1975, by Officer Visage, Officer Visage stated that pursuant to a call received from Joe McCullough at 4:30 p.m.:

"I went to the Justice of the Peace, had him sign the search warrant and met Joe McCullough at 6:00 p.m. up at McDonald's in Fort Oglethorpe." (R-119)

THE QUESTIONS ARE SUBSTANTIAL

(A) Justices of the Peace are authorized under Georgia Law to issue search warrants. They are compensated therefor by the payment of a $5.00 fee by law.

The question thus presented in the case *sub judice* is whether or not a magistrate, who gets paid for allowing

the police to search a citizen's home, but receives nothing if he decides not to allow the police to search the citizen's home, is impartial and detached as is required by the United States Constitution and in particular the *Fourth and Fourteenth Amendments* thereto.

The question is, of course, its own answer. But, oddly enough, it has never been directly decided by this Court, thereby being a question of first impression.

The gravamen of the appellee's contentions is that $5.00 would not affect the Justice of the Peace in his decision and that even if it does, the search is reviewable. The question then precisely is whether the law of the State of Georgia which provides for compensation for the Justice of the Peace Office is offensive to the guarantees set forth in the Fourth Amendment to the United States Constitution.

The question is overwhelmingly important to the citizens of the State of Georgia and the citizens of every state whose persons and homes are subject to searches predicated upon search warrants issued by magistrates financially interested in issuing the search warrants.

In a brilliant and eloquent dissent filed by Justice Gunter, he stated:

> "I further think that evidence obtained unreasonably by the State cannot be used in a criminal trial against the seizure-victim; and evidence obtained and used by the State pursuant to a search warrant issued by a judicial officer who is allowed payment if he issues the warrant but not allowed payment if he does not issue the warrant is the unreasonable attainment and use of evidence in constitutional terms." (App. B-6)

> Justice Gunter earlier in his opinion stated: "I do not think that a warrant for the search of a citizen's house should be issued except upon determination of "probable cause" made by a neutral and detached judicial officer, one who is not compensated for a finding in favor of the State." (App. B-6)

The protections of the Fourth Amendment must be stringently enforced because there is no review from a search of one's house.

There is no review because the citizen's peace and tranquility have been disturbed, his house has been entered against his will and the sanctity of his home has been violated. Therefore, the argument that the fruits of the search are then subjected to a second judicial determination to determine whether or not probable cause existed and thereby the defendant accused is not harmed, is erroneous.

(B) The second question is of great consequence not only to the citizens of Georgia but also to the Country as a whole.

The framers of our constitution never contemplated telephone and electronic communications, so thereby electronic eavesdropping was necessarily not proscribed against specifically by the *Fourth Amendment*. Nor did the framers of our constitution contemplate a situation where a police officer would be eavesdropping on a telephone conversation, claiming he had the consent of one of the parties to the call but not disclosing the party from whom he obtained the alleged consent nor the circumstances surrounding the consent thereby denying the accused the right of confrontation.

If this Court follows the Georgia Supreme Court in

upholding the right of a police officer in the State of Georgia to eavesdrop on a telephone conversation, come into Court and testify about same against one of the parties to that telephone conversation without being able to identify or compelled to identify the party from whom the consent was obtained, then there is absolutely no bar whatsoever to a police officer fabricating such a story and not having actually obtained any consent whatsoever in any shape, form or fashion, but instead having electronically eavesdropped over the telephone.

It is readily apparent if a police officer must only say that he has obtained consent and thereafter further inquiry is stopped by the Court under the pretense of protecting an informer's identity, then it is the police officer who decides what the defendant's *Fourth Amendment* rights are and it is further the police officer who may deny the defendant the right of confrontation, and the judicial inquiry with respect to the form of the consent or actually whether there existed any consent is stopped.

In other words, the officer, Joe Frank McCullough from Chattanooga, Tennessee, determined what the accused's *Fourth Amendment* rights were and not the Superior Court of Walker County, Georgia, and not the Supreme Court of the State of Georgia.

CONCLUSION

It is respectfully submitted that the decision of the Supreme Court of Georgia fails to adhere to the line of cases which proscribe against unlawful searches and seizures predicated upon warrants issued by magistrates who are not neutral and detached, and further fails to adhere to the line of cases decided by this Court in which Fourth and Sixth Amendment protections are decided in the Judicial Branch and are not entrusted to the police for their determination. We believe the questions presented by this appeal are substantial and that they are of compelling public importance. Consideration and resolution of these questions merit plenary briefing and argument before this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

Supreme Court of Georgia

NO. 30,815

JOHN CONNALLY,

Appellant,

versus

THE STATE OF GEORGIA,

Appellee.

Appeal from the Superior Court of Walker County, Georgia

(July 9, 1976)

Supreme Court of Georgia Decided: July 9, 1976
30815. CONNALLY v. THE STATE.

UNDERCOFLER, Presiding Justice.

Defendant, John Connally, was indicted, tried and convicted for having marijuana in his possession and under his control in violation of the Georgia Controlled Substances Act, Code Ann. ch. 79A-8, and received an eight-year sentence. He appeals raising four points of error. We affirm.

Acting on information from a detective of the Chattanooga Police Narcotics division, who had received a tip from an informer that Connally would be receiving a shipment of two tons of marijuana, the Walker County authorities drew up a search warrant for Connally's house and presented it and their information to a Justice of the Peace for his signature. About ten days later, the same Chattanooga detective placed a call for the informer to Connally from the detective's residence, while he listened on an extension, to inquire about the shipment. He overheard Connally tell the informer that Rick and Tom, two Mexicans making the contact, had gotten in a fight in Texas, had been cut up, and would not be making their connection. He, however, had a new contact and hoped to obtain about three to four hundred pounds shortly. A few days later, under the same *eavesdrop arrangement* from the detective's home, the informant agreed to buy one hundred pounds at around one hundred dollars per pound when the shipment arrived. Connally later called the informer at his residence. On the basis of this phone call, the detective and informer met with the Walker County investigator, obtained a new search warrant, and raided Connally's house. There, they arrested Connally and sev-

eral others, and seized some large garbage bags of green leafy material, a closetful of bricks of the same material, and several live plants growing in pots around a swimming pool. This material was identified by a crime lab expert as *Cannabis sativa L.*, marijuana.

1. Connally moved to suppress the evidence seized under the search warrant issued by the Justice of the Peace. He contended the Justice was not a "neutral and detached magistrate" because he had a pecuniary interest in issuing the warrant, in that he is on a fee system and receives $5.00 for issuing a search warrant. Code Ann. § 24-1601. The trial court denied the motion. We affirm.

Connally relies upon *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (SC) (1972) and similar cases which state that an issuing magistrate must be "neutral and detached" together with *Tumey v. Ohio*, 273 U.S. 510, 531 (SC) (1927), which held: "From this review we conclude that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law, unless the costs usually imposed are so small that they may be properly ignored as within the maxim *de minimis non curat lex.*" See *Bennett v. Cottingham*, 290 Fed. Supp. 759, affd., 393 U.S. 317 (89 SC 554) (1969).

Connally argues that applying the rationale of these cases it must be concluded that the Justice of the Peace was not neutral and detached in issuing the search warrant here because unless he issues it he is not paid. The U. S. Supreme Court has not so held and we decline to

do so. We discern a difference in the principles announced in these decisions and are not prepared to construe them together as Connally suggests. Shadwick and similar cases have established only that the "neutral and detached magistrate" required to determine probable cause is one independent of the police and prosecution. No contention is made here that the Justice of the Peace is not independent in that regard.

On the other hand, Tumey and its progeny condemn convictions by a judicial officer who has a substantial pecuniary interest in fines and costs levied against the defendant upon his conviction. This is quite different than the inquiry and adjudication of probable cause for the issuance of a search warrant, where the defendant is not convicted and subjected to fine or imprisonment. The former is not a legal dispute. It is necessarily a unilateral proceeding and only determines probable cause, and is conducted frequently by a person without formal legal training. The dispute and adversary proceedings concerning the validity of the warrant must be raised in the trial court upon a motion to suppress. Code Ann. § 27-313. It is adjudicated there by a judge trained in the law and not on a fee basis. The State has the burden of proving the search and seizure was lawful. Code Ann. § 27-313 (b).

We note too that the Justice of the Peace is not dependent upon an adjudication by the trial court that the search warrant was issued lawfully, nor upon the conviction of the defendant, to be entitled to his fee. His fee is paid by the county out of any fines and forfeitures arising in such county. Code § 27-2906. Also, we are not persuaded that a Justice of the Peace would violate his oath to earn a $5.00 fee and are inclined to

the view that the amount involved in issuing or refusing to issue a search warrant falls within the *de minimis* rule. The Justice of the Peace testified that he had refused to issue search warrants on some occasions.

We have not overlooked *Ward v. Village of Monroeville*, 409 U.S. 57 (SC) (1972) wherein it was held that the defendant was denied a neutral and detached judicial officer where he was compelled to stand trial before the mayor who was responsible for village finances and whose court through fines, forfeitures, costs, and fees provided a substantial portion of village funds. As stated at p. 62, footnote 2, "The question presented on this record is the constitutionality of the Mayor's participation in the adjudication and punishment of a defendant in a litigated case where he elects to contest the charges against him. . . ."

We equate the instant case with *Bevan v. Krieger*, 289 U.S. 459, 465 (56 SC 661) (1933) where it is stated, "The appellant Bevan also advances the contention that the notary had such a pecuniary interest in compelling the testimony as would disqualify him, and deprive his rulings of the impartiality required for due process. Notaries are entitled to fees of twenty-five cents per hundred words for taking and certifying depositions (General Code §§ 127, 1746-2). These are paid in the first instance by the party taking the depositions, and are taxable as costs in the suit. It appears from the record that it is also customary for the notary if, as in this case, he happens to be a stenographer, to take the testimony stenographically and to furnish additional copies to the parties at a charge somewhat less per hundred word than is provided in the statute. These facts are said to bring the case within the principle announced

in *Tumey v. Ohio*, 273 U.S. 510. But we think the suggested analogy does not exist. Tumey, as mayor of a city, sat as a magistrate. His judgments were final as to certain offenses, unless wholly unsupported by evidence. The law awarded him a substantial fee if he found an offender guilty, and none in case of acquittal. Tumey's interest was direct and obvious; but the possibility that the extent of the notary's services and the amount of his compensation may be affected by his ruling is too remote and incidental to vitiate his official action. Moreover, his action lacks the finality which attached to the judgment in the Tumey case, as it is subject to review. . . ." Thus we conclude that there is no merit to Connally's second enumeration of error.

2. In Connally's first enumeration of error he complains that the agent's mere statement that the informer consented to the eavesdropping on the informer's telephone conversation with the defendant was insufficient to satisfy Code Ann. § 26-3006,[1] and deprived Connally of his right to confront the witnesses against him. The Government is privileged to refuse to identify its informers in order to encourage citizens to come forward with information relevant to law enforcement. Code Ann. § 38-1102; *Pass v. State*, 227 Ga. 730 (182 SE2d 779) (1971); *Morgan v. State*, 211 Ga. 172 (84 SE2d 365) (1954). Connally urges, however, that *Roviaro v. U. S.*, 353 U.S. 53, 60-61 (SC) (1957) must be read to require disclosure "[w]here the disclosure of an informer's[2] identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, ..." Since the admissions of Connally would thus be inadmissible without the informer's consent, he claims the informer's identity was "essential to his defense" in that only the informer could refute the detective's statement that consent was given. We disagree.

[1] "Nothing in section 36-3001 [which makes eavesdropping illegal] shall prohibit the interception, recording and divulging of a message sent by telephone . . . in those instances wherein the message shall be initiated or instigated by a person and the message shall constitute the commission of a crime or is directly in the furtherance of a crime, provided at least one party thereto shall consent."

Without deciding whether or not this rule is applicable to informers as well as decoys,[3] we hold that in any case, where the evidence sought from the unidentified source is required by the defendant on "the mere possibility that the police might be impeached [it] is not enough to demand disclosure of the informer's identity." *Scull v. State*, 122 Ga. App. 696, 701 (178 SE2d 720) (1970). Accord, *On Lee v. U.S.*, 343 U.S. 747 (SC) (1952); *U. S. V. Soles*, 482 F2d 105, (2nd Cir., 1973). This is especially true where, as here, the detective's testimony that the call was placed by him from his own home, that the informer and he pulled extension phones into the hallway where the detective, with a rag over his phone, could signal to the informer as to what to say, and that the informant met with the Walker County investigators in the detective's company lends credibility to his assertion that the informer in fact consented. We find no abuse of discretion by the trial court in refusing to require that the State disclose the informer's identity. *Taylor v. State*, 136 Ga. App. 31 (SE2d) (1975).

3. There is no merit to Connally's third contention that the court erred in failing to give his requested

[2] The informer in Roviaro was in fact a decoy.

[3] See Agnor, Ga. Evidence, §§ 6-8 (1976).

charges on joint occupancy as the substance of these requests was covered by the charge given.

4. The fact that the defense offered an expert witness who testified that *Cannabis sativa L.* and *indica* were separate species did not require the trial court to direct a verdict of acquittal. Although the State's expert from the crime lab admitted that his tests did not distinguish among *Cannabis sativa L.*, *indica*, or *roteralis*, he also stated that the majority view was that these were all varieties of the species *Cannabis sativa L.*,[4] possession of which is proscribed by the law. The credibility of these experts was a question properly left to the jury and the court so charged. We hold that the trial court did not err in failing to direct a verdict for Connally. See, *Boyd v. State*, 207 Ga. 567 (63 SE2d 394) (1951). See also, *Ginn v. Morgan*, 225 Ga. 192 (167 SE2d 393) (1969).

The evidence was sufficient to support the verdict.

Judgment affirmed. All the Justices concur, except Hall, J. who concurs in decisions 2, 3, and 4 and the judgment, and Gunter and Hill, JJ., who dissent.

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[4] " 'Marijuana' means all parts of the plant *Cannabis sativa* . . . , whether growing or not, . . ." Code Ann. § 79A-802 (o).

APPENDIX B

In the Supreme Court of Georgia

Decided:

30815. CONNALLY v. THE STATE (623)

GUNTER, Justice, dissenting.

The appellant was indicted, tried, and convicted for having marijuana in his possession and under his control, in violation of the Georgia Controlled Substances Act. He has appealed his conviction and one of his enumerated errors here is: "The court erred in denying the appellant's motion to suppress certain alleged evidence which was admitted and used against the appellant in the Superior Court of Walker County."

The appellant moved in the trial court to suppress evidence obtained by law enforcement officers as the result of a search made pursuant to a warrant issued by a Justice of the Peace. The motion contended that the search violated the Georgia Constitution and the Fourth and Fourteenth Amendments to the United States Constitution in that the warrant "was not issued by a neutral and detached magistrate." The motion further contended that the Justice of the Peace who issued the warrant was compensated solely on the fee system, that if he issued a search warrant he was compensated the sum of five dollars, and that if he did not issue the requested search warrant, he was not compensated at all. Ga. Code Ann. Sec. 24-1601.

Paragraph 10 of the motion to suppress stated: "Because of these constitutional provisions, the defendant is entitled to have a neutral and detached magistrate decide whether or not probable cause existed for the

issuance of a search warrant and in this case as is indicated by the record, and is amply illustrated by the fact that the issuing magistrate had a financial interest in issuing the warrant and would have lost money had he not issued the warrant, there was no neutral and detached magistrate and thereby, the search of the defendant's premises was unreasonable."

I conclude that the motion to suppress the evidence should have been granted by the trial judge, the evidence should not have been used in the trial against the defendant, and I would reverse the judgment.

In *Shadwick v. City of Tampa*, 407 U.S. 345 (1972) at p. 350, the United States Supreme Court said:

> "The substance of the Constitution's warrant requirements does not turn on the labeling of the issuing party. The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court long has insisted that inferences of probable cause be drawn by a 'neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States, supra*, at 14; *Giordenello v. United States, supra*, at 486. In *Coolidge v. New Hampshire, supra*, the Court last Term voided a search warrant issued by the state attorney general 'who was actively in

> charge of the investigation and later was to be chief prosecutor at the trial.' *Id.*, at 450. If, on the other hand, detachment and capacity do conjoin, the magistrate has satisfied the Fourth Amendment's purpose."

In *Coolidge v. New Hampshire*, 403 US 443 (1971) at p. 453 the United States Supreme Court said: "We find no escape from the conclusion that the seizure and search of the Pontiac automobile cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all."

In *Bennett v. Cottingham*, 200 FSupp 759 (1968), a three-judge court said:

> "Since no provision of law is made for the payment of the fees of Justices of the Peace on charges based upon highway violations in the event of an acquittal or nolle prosequi, Justices of the Peace must go unremunerated unless they convict. *The scales of justice are thereby weighted on the side of a conviction.* Such a situation is interdicted by the decision in *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, where it was said:
>
> "[I]t certainly violates the Fourteenth amendment, and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.

> 'The mayor of the village of North College Hill, Ohio, had a direct, personal pecuniary interest in convicting the defendant who came before him for trial, in the $12 of costs imposed in his behalf, which he would not have received if the defendant had been acquitted. This was not exceptional, but was the result of the normal operation of the law and the ordinance.' See *Hulett v. Julian*, supra, where *Tumey* was applied under similar facts to those here involved."

Bennett v. Cottingham was affirmed by the United States Supreme Court, 393 US 317, 89 SCt 554, 21 LEd2d 513 (1969).

See also *Ward v. Village of Monroeville*, 409 US 57 (1972), where it was held that an accused was denied a trial before a disinterested and impartial judicial officer as guaranteed by the Due Process Clause of the Fourteenth Amendment where he was compelled to stand trial for traffic offenses before the mayor, who was responsible for village finances and whose court through fines, forfeitures, costs and fees provided a substantial portion of village funds.

The Justice of the Peace in this case, though having the capacity to issue the warrant, was not a neutral and detached magistrate. This is so because if he made an affirmative finding of probable cause and issued the warrant, he was compensated; but if he rendered a finding of no probable cause, and declined to issue the warrant, he was not compensated. I simply cannot hold that neutrality and detachment exist in such a situation.

Georgia procedure provides that a defendant aggrieved by an unlawful search and seizure may move

to suppress the evidence seized on the ground that a search warrant was illegally executed, and if the warrant was illegally executed, the fruit of the search "shall not be admissible in evidence against the movant in any trial." Ga. Code Ann. Sec. 27-313.

The problem with Georgia's Justice of the Peace system in the areas of search warrants, arrest warrants, and commitment hearings is that the Justice of the Peace is compensated if he finds "probable cause" in cases in each of these three areas, but if he does not find "probable cause" in cases in each of these three areas, he is not compensated. Code Ann. Sec. 24-1601. I believe that self-interest, whether enlightened or unenlightened, is the first principle applicable to all human beings. And applying that principle in these three areas to all Georgia Justices of the Peace, I do not think they are "neutral and detached" in making their determinations of "probable cause" in these three areas.

The Fourth Amendment and its equivalent in the Georgia Constitution (Code Ann. Sec. 2-116) provide that "no warrant shall issue except upon probable cause." This provision in the two Constitutions is, to me, devoid of any meaning whatsoever if the State allows its officer that it has clothed with authority to be compensated with money if he finds probable cause in a particular case but denies him compensation if he does not find probable cause in a particular case. It just seems to me that the State has "stacked the deck" in its favor by authorizing payment to its judicial officers for a finding of probable cause for the issuance of search warrants, arrest warrants, and commitments by courts of inquiry.

My brothers of the majority obviously do not believe

that this method of compensation for Justices of the Peace in Georgia violates either of the two Constitutions, at least in the search warrant area. I respectfully disagree. I do not think that a warrant for the search of a citizen's house should be issued except upon determination of "probable cause" made by a neutral and detached judicial officer, one who is not compensated for a finding in favor of the State.

If the Georgia Supreme Court will not enforce this constitutional principle, it now seems that the only other place for attaining its enforcement is in the Supreme Court of the United States by a writ of certiorari. In *Stone v. Powell* (Number 74-1055, decided July 6, 1976), the Supreme Court of the United States has ruled that search-and-seizure claims, unsuccessfully asserted in state criminal proceedings, cannot be raised in federal habeas corpus review of state convictions.

It therefore seems to me that the court's decision in the instant case today effectively nullifies Fourth Amendment claims based on the non-neutrality of a Justice of the Peace who found probable cause for the issuance of a search warrant.

It is my view that the prosecution by the State of a criminal case, including the gathering of evidence by the State and the use of evidence by the State during a trial, is an integral part of a "fair criminal trial" that is required by the Due Process Clauses found in the Federal and Georgia Constitutions.

I further think that evidence obtained unreasonably by the State cannot be used in a criminal trial against the seizure-victim; and evidence obtained and used by the State pursuant to a search warrant issued by a ju-

dicial officer who is allowed payment if he issues the warrant but not allowed payment if he does not issue the warrant is the unreasonable attainment and use of evidence in constitutional terms.

I respectfully dissent.

APPENDIX C

Georgia Code Annotated, Title 24-1601 (Acts 1877, p. 83, 84; 1878-9, p. 191; 1882-3, p. 110; 1887, p. 55; 1909, p. 175; 1918, p. 124; 1919, p. 99; 1949, pp. 956-959; 1958, pp. 201, 202; 1967, p. 469).

24-1601 (6002, 6003; 1139 P.C.) ENUMERATION OF FEES.

The following shall be the fees for justice of the peace of this State and it shall be lawful for said justices of the peace to charge and collect the same:

Each original summons	$2.00
Each copy summons	1.00
Filing papers in any case	.50
Seal	.50
Affidavit and bond to obtain attachment and issuing same	4.00
Entering judgment in each case	2.00
Trial of each case when same is litigated	3.00
Docketing each case	1.00
Each witness sworn	.75
Issuing each execution	1.50
Affidavit to obtain possessory warrant, Making out and issuing same	4.00
Taking possessory warrant	4.00
Making out interrogatories and certifying same	5.00
Making out recognizances and returning same to court	2.00
Each subpoena for witness	.50
Issuing each distress warrant	5.00
Each affidavit when no case pending	1.00

Answering every writ of certiorari to superior court	$5.00
Presiding at trial of forcible entry and detainer	5.00
Presiding at trial of right-of-way	5.00
Issuing rules to establish lost papers	2.00
Trying the same	3.00
Presiding at trial of nuisance	5.00
Witnessing any paper	1.00
Affidavit and bond to obtain garnishment	3.50
Issuing summons of garnishment	3.00
Each additional copy of garnishment	1.00
Settling case before judgment	2.00
Claim affidavit and bond	2.00
Trying same	3.00
Drawing bonds in civil and criminal cases	5.00
Certifying transcript	3.00
Entering appeal to superior court	3.00
ISSUING EACH SEARCH WARRANT	5.00
Taking testimony in criminal case	4.00
Issuing order to sell perishable property	3.00
Each lien foreclosure and docketing same	3.00
Entering appeal in justice court	3.00
Drawing jury and making out list	4.00
Each order issued by justice	3.00
Each case tried by jury	3.00
Issuing commission to take interrogatories	5.00
Backing fieri facias	1.00
Rule nisi against office	2.00

Trying the same	$2.00
Judgment on same	1.00
Attachment for contempt against office of court	3.00
Issuing warrant to dispossess or against intruder	5.00
Bail trover, affidavit, summons and trial	5.00
Each criminal warrant issued except warrants issued for offenses under the Uniform Act Regulating Traffic on highways	4.00
Each criminal warrant issued under the Uniform Act Regulating Traffic on highways	.50
Taking examination of person charged with criminal offense	4.00
Making out commitment	1.00
Judgment in each criminal case	1.00
Waiving committal trial	2.00

APPENDIX D

IN THE

Supreme Court of the State of Georgia

JOHN CONNALLY,
Appellant,
-Versus-
THE STATE OF GEORGIA.

NO. 30815

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JOHN CONNALLY, the appellant above-named, hereby appeals to the Supreme Court of the United States from the Final Order and Judgment of the Supreme Court of Georgia (affirming the judgment of conviction of the defendant, JOHN CONNALLY, in Criminal Action No. 8667, Walker Superior Court, Walker County, Georgia), entered herein on the 8th day of July, 1976.

This appeal is taken pursuant to 28 USCA 1257(2) which states:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellant was convicted of the crime of possession of marijuana, in violation of the Controlled Substances Act, being Title 79A, Sections 801-822, Georgia Code Annotated (Georgia Laws, Act 1971, pp. 221-265) and was sentenced to eight years confinement at hard labor and is presently enlarged on bail in the sum of $20,000.00.

PART II

The Clerk of the Supreme Court of Georgia is requested to certify the record of the above-captioned case to the Supreme Court of the United States and provide for its transmission to said court, including the entire record in the possession of the Supreme Court of Georgia from which the appeal is taken and omit no part of said record.

PART III

The following questions are presented by this appeal:

(a) Georgia Code Annotated, Title 24-1601, Acts 1877, pp. 83, 84; 1878-9, p. 191; 1882-3, p. 110; 1887, p. 55; 1909, p. 175; 1918, p. 124; 1919, p. 99; 1949, pp. 956-959; 1958, pp. 201, 202; 1967, p. 469, which prescribes a fee for a justice of the peace (magistrate) issuing a search warrant but fails to compensate the same justice of the peace who listens to evidence but fails to issue a search warrant, is repugnant to the FOURTH and FOURTEENTH AMENDMENTS to the United States Constitution and that in particular, it requires by law the magistrate not be detached and neutral but contrariwise to be partial and biased against the defendant and for the issuance of said search warrants.

(b) The alleged "consent to eavesdrop" as related

by Agent McCullough was insufficient to satisfy Georgia Code Annotated Title 26-3006 and as such was:

1. Inadmissible hearsay;
2. Deprived defendant of his right to cross-examine as provided by Georgia Code Annotated Title 38-1705 and *Pointer v. Texas*, 380 US 400 (1965);
3. Deprived defendant of his right to confront the witness against him as provided by the SIXTH AMENDMENT to the United States Constitution and Article 1, Section 1, paragraph 5 of the State Constitution; and
4. Deprived the appellant of his right to remain secure in his person, house, papers and effects against unreasonable intrusions as provided by the FOURTH and FOURTEENTH AMENDMENTS to the United States Constitution.

HATCHER & DANIEL

By: /s/ DAVID P. DANIEL
DAVID P. DANIEL

ATTORNEY FOR JOHN CONNALLY, APPELLANT

HATCHER & DANIEL
ATTORNEYS AT LAW
104 HOWARD STREET
ROSSVILLE, GEORGIA 30741

TELEPHONE: (404) 866-0901

PROOF OF SERVICE

I, DAVID P. DANIEL, attorney for the appellant, JOHN CONNALLY, of the State of Georgia depose and state that on the 6th day of August, 1976, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the State of Georgia by serving Arthur K. Bolton, Attorney General of the State of Georgia by depositing same in the United States Post Office at Rossville, Georgia, with first class postage thereon addressed to the Honorable Arthur K. Bolton, Attorney General of the State of Georgia, Judicial Building, Room 132, Atlanta, Georgia, which said office is within 500 miles from said United States Post Office.

This 6th day of August, 1976.

/s/ DAVID P. DANIEL
DAVID P. DANIEL

ATTORNEY FOR APPELLANT,
JOHN CONNALLY

HATCHER & DANIEL
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PROOF OF SERVICE

I, DAVID P. DANIEL, attorney for the appellant, JOHN CONNALLY, of the State of Georgia depose and state that on the 6th day of August, 1976, I served a copy of the foregoing notice of Appeal to the Supreme Court of the United States on the State of Georgia by serving Earl B. Self, District Attorney of the Lookout Mountain Judicial Circuit, including Walker Superior Court by depositing same in the United States Post Office at Rossville, Georgia, with first class postage thereon addressed to the Honorable Earl B. Self, District Attorney, Lookout Mountain Judicial Circuit, P. O. Box 192, Summerville, Georgia, which said office is within 500 miles from said United States Post Office.

This 6th day of August, 1976.

/s/ DAVID P. DANIEL
DAVID P. DANIEL

ATTORNEY FOR APPELLANT,
JOHN CONNALLY

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CERTIFICATE OF SERVICE

This is to certify that I have this date served three copies of the within and foregoing Jurisdictional Statement upon the following by placing the copies of same in an envelope property addressed to them and depositing same in the United States Mail with sufficient postage thereon to reach their destination, to-wit:

The Honorable Earl B. Self
District Attorney
Lookout Mountain Judicial Circuit
P. O. Box 192
Summerville, Georgia 30747

AND

The Honorable Arthur K. Bolton
Attorney General of the State of Georgia
Judicial Building
Room 132
Atlanta, Georgia

This 27th day of September, 1976.

David P. Daniel
ATTORNEY FOR APPELLANT

Ross L. Hatcher III
ATTORNEY FOR APPELLANT

IN THE

Supreme Court of The United States

OCTOBER TERM, 1976

No. 76-461

JOHN CONNALLY,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

MOTION TO AFFIRM

Please serve:

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-461

JOHN CONNALLY,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

MOTION TO AFFIRM

The State of Georgia, by and through the Attorney General of the State of Georgia, moves this Court to affirm the decision of the Supreme Court of Georgia in the case of Connally v. State, (No. 30815) (1976), insofar as that decision upholds the facial constitutionality of the Georgia law providing for the compensation of justices of the peace on the ground that this particular question is within the rule of certain cases which have been decided by this Court, and therefore, is

so unsubstantial as to warrant no further argument and that the decision of the Supreme Court of the State of Georgia in this regard was correct.

STATEMENT OF THE CASE

The basic concern of the Attorney General of the State of Georgia in the present case involves the challenge to the facial constitutionality of the Georgia law concerning the compensation of justices of the peace. This office did not participate in the trial or conviction of the Appellant, but did file a brief in the Supreme Court of Georgia concerning the constitutionality of the law which is challenged in this appeal. Therefore, this office is unprepared to accept or modify the Appellant's statement of the case. However, to the extent that the Appellant's statement of the case establishes that a search warrant was issued by a justice of the peace who received five dollars compensation therefor, that statement is adopted herein.

ARGUMENT

THE GEORGIA LAW PROVIDING FOR THE PAYMENT OF FIVE DOLLARS TO A JUSTICE OF THE PEACE FOR ISSUING A SEARCH WARRANT IS NOT VIOLATIVE OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The present case sets forth two issues, one of which involves a challenge to the facial constitutionality of Ga. Code § 24-1601 which pertains to the compensation of justices of the peace. It is solely with this issue that this motion to affirm will be concerned. The Appellant challenges Ga. Code § 24-1601 on the ground that a justice of the peace who receives five dollars for issuing a search warrant, but receives nothing for refusing to issue a search warrant, offends the Fourth and Fourteenth Amendments of the United States Constitution. According to Appellant, the law violates these constitutional provisions because it deprives a defendant of the right to a neutral and detached magistrate at the time that a search warrant is issued.

In the Georgia Supreme Court, Appellant relied heavily upon Shadwick v. City of Tampa, 407 U.S. 345 (1972) and Tumey v. Ohio, 273 U.S. 510 (1927). That Court held that Appellant's contention could not be sustained on that authority.

In Shadwick v. City of Tampa, supra, at 350 it was stated:

> "* * * This Court long has insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v. United States, supra, at 14; Giordenello v. United States, supra, at 486."

What the quoted language clearly indicates is that a magistrate is neutral and detached so long as he is independent of the police or, at least, not involved in the enterprise of ferreting out crime. Indeed, after a review of the existing authority, it does not appear that this Court has ever rendered a decision finding a magistrate lacking in neutrality under the Fourth Amendment in any other circumstances.

The Appellant's reliance upon Tumey v. Ohio, supra, in the court below, indicates that his contention was that the issuance of warrants should be governed by the standard of fundamental fairness. That argument was rejected by the Supreme Court of Georgia. The decisions of this Court indicate that even under a standard of fundamental fairness, Ga. Code § 24-1601 is not offensive to the United States Constitution. Tumey v. Ohio, supra, held that a defendant was deprived of the right to a neutral and detached magistrate where the magistrate who presided at his traffic hearing had a direct and substantial pecuniary interest in convicting him. Later, Bevan v. Krieger,

289 U.S. 459, 465 (1933) distinguished the Tumey decision as follows:

> "The Appellant Bevan also advances the contention that the notary had such a pecuniary interest in compelling the testimony as would disqualify him, and deprive his ruling of the impartiality required for due process. Notaries are entitled to fees of twenty-five cents per hundred words for taking and certifying depositions (General Code, §§ 127, 1746-2). These are paid in the first instance by the party taking the depositions, and are taxable as costs in the suit. It appears from the record that it is also customary for the notary if, as in this case, he happens to be a stenographer, to take the testimony stenographically and to furnish additional copies to the parties at a charge somewhat less per hundred words than is provided in the statute. These facts are said to bring the case within the principle announced in Tumey v. Ohio, 273 U.S. 510. But we think the suggested analogy does not exist. Tumey, as mayor of a city, sat as a magistrate. His judgments were final as to certain offenses, unless wholly unsupported by evidence. The law awarded him a substantial fee if he found an offender guilty, and none in case of acquittal. Tumey's interest was direct and obvious; but the possibility that the extent of the notary's services and the amount of his compensation may be affected by his ruling is too remote and

incidental to vitiate his official action. Moreover, his action lacks the finality which attached to the judgment in the Tumey case as it is subject to review. . . ."

The Tumey and Bevan decisions seem clearly to stand for the principle that fundamental fairness is not offended by a system which allows a public official to conduct a proceeding, involving the exercise of judgment, unless such public official has a pecuniary interest in the proceeding, which is substantial, direct and obvious and his judgment is final. Ga. Code § 24-1601 is not offensive to this rule. The five dollar fee which the justice of the peace receives for issuing a search warrant is not substantial. In addition, the fee is not collected directly from the defendant (as in Tumey), but from the county funds. Also, the issuance of a search warrant is not a final judgment, but is reviewable in the normal course of a criminal case through a motion to suppress. The instant case is clearly within the rule of Bevan v. Krieger, supra.

CONCLUSION

While the Georgia law challenged in the present case has not been expressly approved by this Court, the decisions of this Court indicate that the law is not offensive to either the Fourth or Fourteenth Amendment of the United States Constitution. Indeed, it does not appear on the face of the statute that a justice of the peace is not neutral and detached.

Further, it does not appear from the face of the statute that a defendant is denied fundamental fairness when a search warrant is issued to search his premises.

For the above reasons, it is respectfully submitted that the Georgia law challenged in this case is constitutional under the United States Constitution, and the decision of the Supreme Court of Georgia so ruling should be affirmed.

Respectfully submitted,

ARTHUR K. BOLTON
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ROBERT S. STUBBS, II
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ISAAC BYRD
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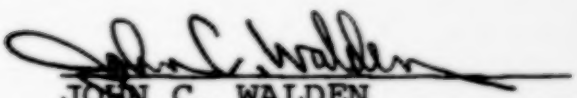
PROOF OF SERVICE

I, John C. Walden, Attorney for Appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served three copies of the foregoing Motion to Affirm upon the Appellant by depositing same in a United States mailbox, with first class postage prepaid, addressed to counsel of record as follows:

David P. Daniel
Attorney for Appellant
104 Howard Street
Rossville, Georgia 30741

This 29th day of October, 1976



JOHN C. WALDEN